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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

DEAN M. ANDRUS; ALVIN C. BALLARD; ROBERT LEE BANKS; BERT C. BINION; DONNIE F. BUSH; FLOYD VALE BUTTS; JACK JUNIOR CAPPS; RAYMOND WILSON CHAPPELL; CLARENCE M. CHELLMAN; EUGENE V. DAIS; RONALD W. DAIS; WILLIAM R. DOSSEY; RICHARD C. DUMOND; PETE TINOCO DURAN; RALPH S. EASON; SHELDON W. FROST; WILLIAM FRED GOLLNICK; FRED EDWARD GREAVER; CLYDE McEVENY GREGORY; BENJAMIN D. GROVES; JERRY HALE; MILBURN HEIMSOTH; ROBERT W. HEINRICHS; HOWARD A. HENDERSON; CHARLES SAMUEL HERTY; ERNESTO E. HIDALGO; BOB WILLIS HOLDRIDGE; WILLIAM G. HOSSELE; JACK I. IKEMOTO; DONALD GENE KEELING; PHIL NEIBAUR KNAPP; CONNOR W. KNIGHT; GLENN GENE KNUTZ; WILLIE E. LANCE; ROBERT H. LEDOUX; GERALD E. LONG; EDDIE LOUIS; CHARLES LYNCH; PAT H. MALCOM; BOYD W. MARLEY; ERNEST WOODROW McCALL; LEONARD DAVID MILAM; CLYDE A. MILLER; EDWIN WAYNE MILLER; IVAN LLOYD MOORE; JOHN MOTA; HERMAN E. NORTHCOTT; CLARENCE LLOYD PIERCE; DAVID EARL PORTER; ROGER POWELL; DAVID MILTON PRITCHARD, SR.; WILLIAM A. RENFROE; CHARLES RIFE; VICTOR SAFFREY ROBELLO; NORMAN G. ROGERS; SAM S. SANSONI; LOUIS W. SCHWOERER; BILLY CHARLES SCOTT; CARL R. SCOTT; REX C. SHELLEY; LAIRD M. SMITH; WALTER R. SMOUSE; ROBERT O. SORICK; BILLY LEE STEWARD; JACK L. SUTHERLAND; DONALD LEO THOMPSON; DONALD L. TOLBERTSON and JAMES W. WRIGHT and RICHARD RICE, *Petitioners*,

vs.

CONVOY COMPANY, an Oregon corporation, and HADLEY AUTO TRANSPORT CORPORATION, a California corporation, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

I

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 22, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced and attached hereto as Appendix A. It is not yet reported.

The opinion of the District Court is reproduced and attached hereto and marked Appendix B. The District Court opinion was not reported.

JURISDICTION

The Judgment of the Court of Appeals (Appendix A attached hereto) was entered on June 22, 1973. The Court of Appeals issued its Stay of Mandate, copy of which is attached as Appendix C.

QUESTIONS PRESENTED

Whether the Court may review the Decision of an arbitrator arising out of a grievance procedure filed pursuant to a collective bargaining agreement and the decision of the arbitrator is on the issue of the right power and authority of the arbitrator.

STATEMENT OF THE CASE

This is an action seeking a declaration of rights under various collective bargaining agreements. The case originated on a complaint brought by certain employees of their former employer, Convoy Company (Convoy) and, in the instances it applies, their present employer, Hadley Auto Transportation Corporation (Hadley), seeking a judgment declaring that the present employer, Hadley, was bound by a collective bargaining agreement of their union and their former employer, Convoy. Both Hadley and Convoy were companies independently engaged in the transportation of newly manufactured automobiles from the Ford Motor Company in Milpitas, California. In 1967 Ford decided to employ only one carrier of its Milpitas autos; Hadley was to be that carrier. Consequently Hadley purchased the bulk of Convoy's equipment and Hadley obtained an interest in the real estate owned by Convoy. The Convoy employees, Petitioners herein, were advised of the sale and were terminated by Convoy. Hadley advised these employees that some of them may be rehired but their seniority would commence as of the date of hire by Hadley (subsequent to March 1, 1967) not their date of hire by Convoy. Some employees, also Petitioners herein, were not hired.

In accordance with a National Master Collective Bargaining Agreement (to which both Hadley and Convoy were signatories) grievances against both Hadley and Convoy were filed on behalf of Petitioners.

The employees urged at the arbitration hearing convened as a result of the filing of their grievance that Hadley was either a "successor" or "absorbed" the business of another carrier and that therefore Hadley was bound by the terms of the contract and respect their seniority. The employees relied on two articles of the master agreement namely:

Article I, Section 3:

"This agreement shall be binding upon the parties hereto, their successors, . . ."

Article V, Section 2:

"In the event that the employer absorbs the business of another private contract or common carrier, or is a party to a merger of lines the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the employer and the unions involved. Any controversy with respect to such matters shall be submitted to the joint grievance procedure. (Article VII)."

(These provisions are referred to hereafter as the "successor" and "absorption" clauses.)

The arbitration committee made five specific findings of fact pertaining to the extent to which Hadley became a successor to the interest of Convoy after March 1967, and made its decision:

"The employees of CONVOY COMPANY have no seniority rights with HADLEY AUTO TRANSPORT arising from Article I, Section III ("Successor") or Article V, Section II, ("Absorption") of the National Master Automobile Trans-

porters Agreement . . ." (Emphasis and parentheticals added).

The District Court rendered its decision in favor of Hadley and Convoy, holding that the decision of the arbitration committee was final under the law and under the terms of the Collective Bargaining Agreement and that the decision therefore was not Court reviewable.

The employees appealed. The Appellate Court affirmed the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

The United States Court of Appeals for the Third Circuit in the case of *Bieski v. Eastern Automobile Forwarding Company*, 396 F.2d 32 (1968) rendered a decision on virtually the same factual situation as the case at bar. The *Bieski* case involved the employees of two trucking companies hauling new automobiles. There was a sale of assets by one of the trucking companies to the other after it was determined that the new car manufacturer was to do business with only one. The Collective Bargaining Contract was, word for word, the same as the Collective Bargaining Contract in this case. An arbitration was convened which the employees lost because the arbitration committee held, as the arbitration committee did in this

case, that the "absorption" and "successor" provisions were not applicable. The District Court refused to intervene. The Third Circuit Court of Appeals reversed stating, "We conclude that the joint committee on this record should have proceeded to determine the controversy with respect to seniority."

The trial Court, in the case at bar, concluded that the *Bieski* case was indistinguishable from the case at bar but the trial Court disagreed with the reasoning in the *Bieski* case. The Court below, the Ninth Circuit, agreed with the trial Court and as a result, a direct conflict exists in the decisions on this issue rendered in the Third Circuit and in the Ninth Circuit regarding the power of the courts to review decisions resulting from private arbitration.

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2. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

The trial Court and the Court below held against Petitioners on the grounds that the decision of the arbitrator is final and not Court reviewable (except for specific reasons not involved in this case). It is the position of Petitioners that, because the arbitrator held the "successor" clause and the "absorption" clause were inapplicable to the facts in this case surrounding the transfer of assets from Convoy to Hadley, the decision of the arbitrator was limited to the issue as to whether the arbitrator had jurisdiction.

That the decision was not one deciding the merits of the case.[1]

In *Humphrey v. Moore,* 375 U.S. 335, 84 S.Ct. 363 (1964) this Court *reviewed* a decision of the arbitrator and made a holding as to its reasonableness. In *Humphrey* the power of the arbitration committee to sit was challenged. Additionally in footnote 8 this Court stated "reconciliation of these two provisions, ("successor" and "absorption" provisions) going to the power of the committee under the contract, itself presented an issue ultimately for the Court, not the committee to decide." 375 U.S. at 370.

It might also be stated at this point that the Ninth Circuit in the case of *Wackenhut Corporation v. United Plant Guard Workers of America,* 332 F.2d 954 (1964) in effect assumed the power to decide on the issue of jurisdiction of the arbitrator. In that case the successor employer refused to arbitrate the question of seniority rights of the employees of the predecessor. The Ninth Circuit ordered the successor to specifically perform the Collective Bargaining Agreement of the predecessor. The importance of *Wackenhut* is that the Court did not make an order requiring the arbitrator to determine whether there was a contractual obligation on the part of the successor employer. The issue as to the existence of the

[1]The Court below, in footnote 3 feels that the decision of the arbitrator did reach the merits. Sole support for this holding is a statement in the decision denying the seniority. However the arbitrator's decision denying seniority was based on the determination of one issue and one issue only, namely, did the facts surrounding the transfer of the assets of the two employers, Convoy to Hadley, cause the "successor" or "absorption" clauses to become operative.

contractual obligation was an issue decided by the Court.

The decision of the Court below is in conflict with the dictum expressed in both the *Humphrey* case and *Wackenhut* case. The Court below feels that to be permitted to attack a decision of an arbitrator on the issue of the right, power and authority of the arbitrator to sit is a "jurisdictional gambit" that should be rejected.

The Court below does not reject its holding in *Wackenhut* that the Courts do have the power to decide whether or not the successor employer must submit to arbitration under a Collective Bargaining Agreement entered into by his predecessor.

If the Courts have the power that was exercised in the *Wackenhut* case, it would seem illogical to deny the Court the power to review the jurisdictional issues concerning an arbitration. Let us assume, for the purposes of this petition, that the Court had ordered Hadley to arbitrate, that arbitration had taken place and that the arbitrator held that the "successor" or "absorption" provisions were inapplicable.

Clearly, under the assumed facts, the Court continues to hold the power to order the arbitrator to reverse his decision. A contrary holding would be to allow a decision of a federal court to be appealed to the forum of a private decision maker, and reversed without further recourse. If the Courts have the power to order litigants to arbitration, the Courts must re-

tain the right to review the decision of an arbitrator on the issue of his right, power and authority to sit in arbitration.

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3. THE JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court was invoked under 29 U.S.C. Section 185(a).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
HERBERT S. STANEK,
THORNE, CLOPTON, HERZ, STANEK, INC.,
Attorneys for Petitioners.

July 26, 1973.

(Appendices Follow)

Appendix A

United States Court of Appeals
For The Ninth Circuit

No. 71-1392

Dean M. Andrus, et al.,
Appellants,
vs.
Convoy Company, et al.,
Appellees.

[June 22, 1973]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and THOMPSON,* District Judge

HUFSTEDLER, Circuit Judge:

Appellants, who are union members, sued their present employer Hadley Auto Transportation Corporation ("Hadley") and their former employer Convoy Company ("Convoy") seeking unsuccessfully to overturn an arbitrators' decision that rejected their seniority grievances presented to the arbitrators by their unions. The employees did not challenge the

*Reno, Nevada, sitting by designation.

fairness or adequacy of the unions' representation in the grievance procedure, nor did they impugn the integrity of the arbitration process. We affirm the judgment holding that the employees are bound by the arbitrators' decision, and they cannot maintain this action.

Each appellant belonged to one of three locals: International Association of Machinists & Aero-Space Workers, AFL-CIO, District Lodge 93; Local 287, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and Local 576, Teamsters Automotive Workers Union. Convoy and Hadley were members of a multiemployer, multiunion collective bargaining unit. The companies and the locals to which appellants belonged were parties to the same collective bargaining agreement and supplements. Hadley and Convoy were engaged in transporting new Ford automobiles from the Ford Motor Company plant in Milpitas, California. Ford decided to employ Hadley as its sole carrier in the fall of 1966. Convoy's employees were told in March 1967 that Convoy was terminated and that they could apply for jobs with Hadley, but, if they were hired, their seniority would date from their new employment without carryover from the Convoy employment.

Local 287 filed grievances on behalf of their members, including appellant-employees who belonged to Local 287, claiming that their contractual rights were violated when Hadley refused to recognize their accumulated seniority. Lodge 93 and Local 576 did not

file independent grievances, but the parties stipulated that they would be bound by the resolution of Local 287's grievances. All the grievances were based on the "successor" and "absorption" clauses of two articles in the National Master Agreement.[1] Under Article 7 of that Agreement, the grievances were referred to the National Automobile Transporters Joint Arbitration Committee ("Committee"). After a full and fair hearing, the Committee decided that Convoy's employees had no seniority rights with Hadley arising from the successor or absorption clauses.[2] Appel-

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[1]Article 1, Section 3:

This Agreement shall be binding upon the parties hereto, their successors, ..."

Article 5, Section 2:

"In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matters shall be submitted to the Joint Grievance Procedure. (Article 7)."

[2]"FINDINGS OF FACTS:

1. Hadley Auto Transport has not purchased and does not intend to purchase any operating authority from Convoy Company.

2. Hadley Auto Transport has not purchased the corporate entity of and/or has not entered into a legal merger or consolidation with Convoy Company.

3. Hadley Auto Transport did purchase various numbers of motor vehicles and trailers and office and shop supplies and equipment from Convoy Company.

4. Hadley Auto Transport is presently transporting traffic which was formerly transported by Convoy Company from Milpitas, California tendered to them by Ford Motor Company.

5. The facts presented did not indicate a subtrafuge [*sic*] by Hadley and/or Convoy Company and/or any third party.

DECISION: Based upon the above findings of facts, the employees of Convoy Company have no seniority rights with Hadley Auto Transport arising from Article 1, Section 3, or Article 5, Section 2, of the National Master Automobile Trans-

lants brought this action seeking declaratory relief and vacation of the award, contending that the Committee lacked jurisdiction to adjudicate the grievance, a theory spun primarily from *Bieske v. Eastern Automobile Forwarding Co.* (3rd Cir. 1968) 396 F.2d 32.

We reject any implication from *Bieske* that a fairly represented employee can attack an arbitration decision made in the context of collective bargaining by challenging the arbitrators' jurisdiction.[3] Judicial resort to such jurisdictional gambits has been firmly rejected by the Supreme Court. (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 584-85; *Steelworkers v. American Mfg. Co.* (1960) 363 U.S. 564, 569; *cf. Vaca v. Sipes* (1967) 386 U.S. 171; *Humphrey v. Moore* (1964) 375 U.S. 335.)

We agree with the Fifth Circuit that the employees cannot attack the final award, "except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a 'sham, substantially inadequate or substantially

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porters Agreement or Article 30 of the Western Conference Area Supplemental Agreement. Therefore, in event former Convoy Company employees are employed by Hadley Auto Transport, their seniority date shall be their date of hire with Hadley Auto Transport. The Committee strongly recommends that Hadley Auto Transport employ the former employees of Convoy Company, in event it has need of additional employees."

[3]This case does not involve a decision by the Committee that it was without power to hear the complaint, as the employees have suggested. Rather, the decision of the Committee reaches the merits of the ultimate rights claimed:

"Therefore, . . . their seniority date shall be their date of hire with Hadley Auto Transport." (*See* note 2 *supra.*)

unavailable.'" (*Harris v. Chemical Leaman Tank Lines, Inc.* (5th Cir. 1971) 437 F.2d 167, 171; *cf. Acuff v. United Papermakers & Paperworkers* (5th Cir. 1968) 404 F.2d 169.)

None of the exceptional circumstances existed here.

AFFIRMED.

Appendix B

In The United States District Court
Northern District of California

Civil Action No. 50133 RFP

Dean M. Andrus, et al.,
Plaintiffs,
vs.
Convoy Company, an Oregon Corporation, et al.,
Defendants.

[Filed Jan. 19, 1971]

ORDER GRANTING JUDGMENT FOR DEFENDANTS

In this case, plaintiffs seek a declaration of their seniority rights under their respective collective bargaining agreements. One group of plaintiffs was represented by the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 93; a second group of plaintiffs was represented by Local 287, International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of America; a third group was represented by Local 576, Teamster Automotive Workers Union. All of

these plaintiffs were, prior to March 1, 1967, employed by Convoy Company, an Oregon corporation.

Convoy, a common carrier, operated in part out of a terminal facility in Milpitas, California. Its primary, although not sole, Milpitas account was the Ford Motor Company for whom Convoy transported new cars from Ford's own Milpitas plant. Also engaged in the transportation of newly manufactured Ford autos from the Milpitas plant was the Hadley Auto Transport Corporation. On or about March 1, 1967, Convoy ceased its Milpitas operation. This was necessitated by Ford's decision to employ only one carrier of its Milpitas autos; Hadley was to be that carrier. Ford had made this choice in early 1966 and had notified Convoy to that effect in November, 1966. Negotiations had then commenced between Hadley and Convoy, the primary object of which was a purchase by Hadley of Convoy's Milpitas equipment which Hadley would need to handle its expanded operations. These negotiations in fact resulted in the eventual sale to Hadley of the bulk of Convoy's equipment. Further, Hadley had notified the unions representing the Convoy employees that of course Hadley would as of March 1, 1967 or thereabouts be in need of many additional employees and that the Convoy employees would be welcome to apply for these positions. Hadley took the position, however, that the Convoy employees would not be entitled to carry over their seniority to their Hadley employment. Many Convoy employees were in fact subsequently hired by Had-

ley, and were not accorded carry-over seniority. From this the present controversy stems.

The unions representing these Convoy employees proceeded to file a grievance[1] with the Local Joint Arbitration Committee pursuant to Article 7 of the National Master Automobile Transporters Agreement.[2] The unions contended, and contend herein, that Hadley was bound to dovetail the seniority of the Convoy employees it hired. The bases of this contention were Article 1, section 3 and Article 5, section 2 of the National Master Agreement. Article 1, section 3 provides:

> This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns . . . .

Article 5, section 2 states that:

> In the event that the Employer absorbs the business of another private, contract or common carrier . . . the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the Joint Grievance Procedure. (Article 7).

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[1]Strictly speaking, only Local 287 filed a grievance. But it was understood by the concerned parties that Lodge 93 and Local 576 would abide by the results obtained in Local 287's arbitration. Stipulation of Facts No. 1, p. 7.

[2]Hadley, Convoy, and the three unions herein were all members of a multi-employer, multi-union bargaining unit. As such, all were parties to the area-wide collective bargaining agreements and supplements, among which was the National Master Agreement. Exhibits A through E of Stipulation of Facts No. 1.

The unions therefore argued that Hadley was either a "successor" to Convoy under Article 1, section 3 or else had "absorbed" Convoy by the terms of Article 5, section 2, and that in either case, Hadley was required to dovetail the seniority of the former Convoy employees.

Since these contentions involved interpretations of provisions of the National Master Agreement, the Local Joint Committee, to which the grievance was initially submitted, referred the matter to the National Automobile Transporters Joint Arbitration Committee (the "National Committee") pursuant to Article 7, section 7(a) of the National Master Agreement. This section provides:

> It is agreed that all matters pertaining to the interpretation of any provision of this National Master Agreement . . . must be submitted to the National Automobile Transporters Joint Arbitration Committee, which Committee after listening to testimony on both sides, shall make a decision.

Subsection (c) then goes on to provide:

> Any decision of any of the Joint Arbitration Committees referred to above [subsection (b) provided for interpretations of area supplements and local riders by area joint arbitration committee] shall be final and conclusive and binding upon the Employer and the Union, and the employees involved.

The National Committee took testimony and rendered a decision adverse to the unions representing the former Convoy employees, concluding that ". . . the em-

ployees of Convoy Company have no seniority rights with Hadley Auto Transport arising from Article 1, Section 3, or Article 5, Section 2, of the National Master Automobile Transporters Agreement. . . ." Exhibit F of Stipulation of Facts No. 1.[3]

Plaintiffs then commenced this suit, in which the Court must now determine whether this decision of the National Committee is (a) Court reviewable absent any allegations of fraud or deceit, and if so, (b) whether it is correct on the merits. We hold that the decision is not Court reviewable because of the terms of Article 7, and do not therefore reach the merits of the Committee's decision.

In making an inquiry of this kind, a sound starting point is national labor policy as enunciated in the *Steelworkers* trilogy of Supreme Court cases.[4] These decisions established a strong federal labor policy of favoring arbitration as the dispute-resolving mechanism in a collective bargaining agreement context. The Court stated that the policy of section 203(d) of the Labor Management Relations Act—that of endorsing private methods of settling labor disputes—could be effectuated "only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." 363 U.S. at 566. And further:

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[3]Apparently no transcript was made of the proceedings before the National Committee. Exhibit F is the minutes of that meeting.

[4]*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

While this statement was made in the context of a suit to compel arbitration—which is not the case herein—its import is clear and transcends its factual context: where a collective bargaining agreement calls for the arbitration of questions of contract interpretation, such questions are for the arbitrator in the first and last instance.[5]

All the parties herein apparently concede that the questions of contract interpretation in the present case were for the arbitrator at least in the first instance, since the grievance was in fact submitted to arbitration.[6] The issue here, therefore, is not one of

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[5]The Supreme Court reiterated later in the trilogy:

> It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. 563 U.S. at 599.

[6]Moreover, it is not disputed that the issues of "successship" and "absorption" pose questions of "contract interpretation". It is because "contract interpretation" is involved that the local arbitration committee referred the dispute herein to the National Committee pursuant to Art. 7, section 7 of the National Master Agreement.

arbitrability—an issue ordinarily subject to Court review.[7] But it is plaintiffs' contention, however, that the questions of interpretation involved here are for the arbitrator in the first instance only; that these questions are "jurisdictional" and therefore subject to full court review. For the reasons stated below, this Court must reject this contention.

The first problem with such an argument is the *Steelworkers* trilogy, supra n.4. However one characterizes the arbitrator's interpretations of provisions of the agreement, to say that decisions in that regard are court reviewable is to ignore the plain, unambiguous statements in these Supreme Court cases and the policy which they intend to further. If the parties to a collective bargaining instrument agree to arbitrate questions of interpretation of that instrument, and further agree that such arbitration shall be final, then the courts will not review the arbitrator's decision.

It is of course true that a question of interpretation of a contract provision can be said to be "jurisdictional" in the sense that the arbitrator's own authority is circumscribed by the very contract which he interprets. But the parties to a collective bargaining agreement can choose to make those interpretations final and binding. In so doing, they forego the advantages of court review, but in exchange they are able to provide for the final resolution of their disputes by a private, agreed-upon method. And the fed-

[7] *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, n.7 (1960).

eral labor policy as enunciated in the *Steelworkers* cases strongly supports that kind of choice made by labor and management.

The second problem with the plaintiffs' argument for Court review is that a natural reading of the agreement itself precludes such review. Article 7, sections 7(a) and (c), quoted above, provides that matters pertaining to the interpretation of any provision must be arbitrated and that any decision therein is final and binding. There is no language in Article 7 which limites the application of its provisions. There is no language in Article 1, section 3 (containing the successorship clause) which excludes interpretations of it from Article 7's arbitration provisions. And Article 5, section 2 (the absorption provision) specifically states that recourse is to be had to Article 7 for the resolution of disputes within the subject of that section.[8] It therefore appears that Article 7 should be given effect in the present case.

The Third Circuit has in fact concluded otherwise, *Bieski v. Eastern Automobile Forwarding Company*, 396 F.2d 32 (1968), but we are disinclined to follow its lead. The factual situation and the bargaining agreements involved in *Bieski* are not readily distinguishable from the instant case. There the Court held that the general finality-of-arbitration language was not applicable to the absorption provision and that the arbitrator's decision on the question of absorption

[8]It is not apparent why Article 5, section 2 makes specific reference to the arbitration procedures in Article 7, since Article 7 is on its face all-encompassing. The language appears superfluous.

was therefore reviewable. Moreover, the absorption issue was "jurisdictional" since a conclusion that no absorption had occurred would preclude consideration of the "merits"—the seniority claims of the absorbed employees. The reason for not applying the finality language was that in some absorption situations, one of the unions—the union of the absorbed employees —would not be a party to the employer's agreement and would not therefore be bound to look to the joint grievance procedure provided in that agreement and referred to in the absorption section. 396 F.2d at 39. The role left for the explicit reference to the grievance procedure was to resolve any lack of agreement between the employer and the union who was a party to the agreement. Such lack of agreement would arise if the employer decided to follow a seniority request of the non-party union, for example, with which the party union did not agree.

With due respect for this reasoning, this Court thinks it too attenuated. Article 5, section 2 of the present agreement, and the relevant section of the *Bieski* agreement speak of "the seniority of the employees absorbed *or affected*" as being "determined by mutual agreement between the Employer and Unions involved." [Emphasis supplied]. If an agreement cannot be reached, then the controversy is to be arbitrated. Art. 5, §2. What is of central importance here is that this is a section of the National Master Agreement, and that each employer and each union involved in the present controversy is a party to that agreement. It is precisely the function of a national

agreement to fill the gaps left by the multitude of local employer-union agreements. The national agreement binds parties to arbitrate should they become involved in a common dispute although they lack any direct contractual relation with one another. Article 5, section 2 is a good example of this: it requires a union representing a group of absorbed employees to arbitrate seniority grievances with the absorbing employer despite the lack of any direct agreement between these entities to so arbitrate.

Since the employer and the unions herein were bound, therefore, to arbitrate when mutual agreement could not be reached concerning seniority, Article 7, section 7(c) operated to insulate the arbitrator's determinations from court review.[9] This is the reading of Article 5, section 2 and Article 7, section 7 which gives the national agreement its intended effect and which furthers federal labor policy.[10]

Plaintiffs make no claim that the proceedings before the Committee were not fair or that the proceedings did not conform to the arbitration provisions of the agreement. Plaintiffs do not allege any fraud or

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[9] *Humphrey v. Moore*, 375 U.S. 335 (1964), may lend some support to the *Bieski* court's conclusion of reviewability, since in Humphrey the Supreme Court reviewed the facts underlying the absorption issue and concluded that the arbitrator's decision was reasonable. But the *Humphrey* Court expressly disavowed deciding the question resolved in *Bieski* and in issue here. 375 U.S. at 345, n.8.

[10] And while this reading of the agreement may render superfluous the reference to Article 7 in Article 5, section 2, this we think is preferable to striving mightily to ascribe some meaning to the reference when the result is doubtful anyway and is contra to federal labor policy.

deceit or any breach of the duty of fair representation on the part of the union. The decision of the National Committee is thus binding in accordance with the parties' agreement.

Accordingly, it is the order of this Court that judgment be granted in favor of defendants.

SO ORDERED.

Dated, Jan. 18, 1971.

ROBERT F. PECKHAM,
United States District Judge.

Appendix C

United States Court of Appeals
For The Ninth Circuit

No. 71-1392

Dean M. Andrus, et al.;
Plaintiff-Appellant,
vs.
Conroy Company, et al.,
Defendant-Appellee.

[Filed July 11, 1973]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Richard W. Herz, Esq. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before July 30, 1973.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Shirley Hufstedler
United States Circuit Judge.

Dated: San Francisco, California,
July 11, 1973.

SUPREME COURT, U. S.
FILED
SEP 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-199

DEAN M. ANDRUS, *et al.*, *Petitioners,*

vs.

CONVOY COMPANY, an Oregon corporation, and HADLEY AUTO TRANSPORT CORPORATION, a California corporation, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Jurisdiction.

Petitioners have failed to assert any statutory provision conferring on this Court jurisdiction to review the judgment below. Accordingly, the petition herein should be denied for failure to invoke the jurisdiction of this Court as provided in Supreme Court Rule 23 (1)(b)(iii).

Rule and Statute Involved.

Supreme Court Rule 23(1)(b)(iii) provides in relevant part:

> "1. The petition for a writ of certiorari shall contain in the order here indicated—
>
> . . . (b) A concise statement of the grounds on which the jurisdiction of the court is invoked, showing
>
> . . . (iii) The statutory basis believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari."

29 U.S.C. §185(a) (Section 301(a) of the Labor Management Relations Act of 1947):

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties."

Question Presented.

After unions and employers have submitted a dispute concerning the interpretation and application of their collective bargaining a[illegible]ment to final and binding arbitration, may the arbitration award be set aside by a court at the behest of individual employee grievants in the absence of fraud, deceit, or breach of the duty of fair representation?

Statement of the Case.

Respondents Convoy Company (hereinafter "Convoy") and Hadley Auto Transport Corporation (hereinafter "Hadley") were, prior to March of 1967, each engaged in the transportation of new automobiles from the Ford Motor Company plant in Milpitas, California, to various points in the Western United States. In early 1967 Ford Motor Company designated Hadley as its exclusive carrier for its Milpitas plant. In March of 1967 Convoy ceased operations in the Milpitas area and terminated its employees (R. pp. 76-78).

The employees of both Convoy and Hadley were represented by the same labor organizations (hereinafter the "Unions"), and both Convoy and Hadley were, along with the Unions, members of a multi-employer, multi-union collective bargaining unit, and parties to the National Master Automobile Transporters Agreement (hereinafter the "National Master Agreement") and to the Western Conference Area Supplemental Agreement (hereinafter the "Local Supplemental Agreement") (R. pp. 74-76).

Hadley immediately offered employment to a number of the terminated Convoy employees, but took the position that they would be treated as new hires for seniority purposes. This action caused the Unions to file a grievance against both Hadley and Convoy, contending that Hadley was obligated to honor seniority attained in Convoy's employ, and that the Convoy and Hadley seniority lists should be dovetailed (R. p. 78). The Unions specifically alleged a violation of the "successor" and "absorption" clauses of the National Master Agreement, and of Article 30, Section 1 of the Local Supplemental Agreement, which provided that ". . . any controversy

over the seniority standing of an employee on the seniority list" is grievable (R. pp. 126, 195).

The Unions and the employers submitted the dispute to an arbitration committee for decision pursuant to Article 7, Section 7, of the National Master Agreement which provided that ". . . *all matters pertaining to the interpretation of any provision of this National Master Agreement* . . . must be submitted to the National Automobile Transporters Joint Arbitration Committee. . . ." (Article 7, Section 7; R. pp. 114-115; emphasis added.) The National Master Agreement also provided that "A decision by a majority of a Panel of any of the Committees *shall be final and binding on all parties, including the employee and/or employees affected.*" (Article 7, Section 5; R. pp. 114; emphasis added.)

The arbitration committee provided a full and fair hearing at which the Unions and the employers advanced their respective interpretations of the agreements (R. pp. 195-196). Petitioners have not claimed that the Unions breached their duty of fair representation.

The arbitration committee decided the case in favor of the employers, concluding that:

> ". . . the employees of Convoy Company have no seniority rights with Hadley Auto Transport arising from Article 1, Section 3, or Article 5, Section 2, of the National Automobile Transport Agreement, or Article 30 of the Western Conference Area Supplemental Agreement. Therefore, in

> the event former Convoy Company employees are employed by Hadley Auto Transport, the seniority date shall be their date of hire with Hadley Auto Transport. . . ." (R. p. 196).

The former Convoy employees who were adversely affected by the arbitration award then brought the action below, seeking vacation of the award and a declaration of their rights under the collective bargaining agreement. The District Court granted judgment for defendants, holding that the arbitration committee's interpretation of the substantive terms of the agreements is final and binding in the absence of any claims of unfair representation or irregularity in the proceedings (Appendix B of Petition, pp. xi-xii).

The Court of Appeals affirmed, characterizing petitioners' theory of the case as a "jurisdictional gambit" which has been firmly rejected by this Court. (Appendix A of Petition, p. iv).

REASONS FOR DENYING THE WRIT.

I.

The Decision Below Is Clearly Correct.

The Court of Appeals for the Ninth Circuit correctly held that the arbitration committee's decision is not reviewable at the behest of individual employees except upon grounds of fraud, deceit or breach of the duty of fair representation, or unless the grievance procedure was a sham or unavailable—none of which grounds are alleged by petitioners herein.

This rule was clearly enunciated in *Vaca v. Sipes,* 386 U.S. 171 (1967), in which this Court held that an individual employee could sue his employer "*provided* the employee can prove that the union . . . breached its duty of fair representation in its handling of the employee's grievance." (386 U.S. at 186, emphasis added.) The Court also noted that "the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by the union." *Id.* See also *Humphrey v. Moore,* 375 U.S. 335, 342-44 (1964).

This rule barring individual grievants' collateral attack on arbitration decisions has been routinely followed by the lower courts. *E.g., Morris v. Werner-Continental, Inc.,* 466 F.2d 1185, 1190-91 (6th Cir. 1972); *Harris v. Chemical Leaman Tank Lines, Inc.,* 437 F.2d 167, 171 (5th Cir. 1971); *Steinman v. Spector Freight System, Inc.,* 441 F.2d 599 (2nd Cir. 1971); *Chambers v. Beaunit Corp.,* 404 F.2d 128, 132 (6th Cir. 1969); *Albert v. Chemical Leaman Tank Lines, Inc.,* 344 F. Supp. 1141 (S.D. W. Va. 1972). See also Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Calif. L. Rev. 663, 705-706, 822 n. 621 (1973).

Conspicuously absent from the instant case is any claim by petitioners that the Unions breached their duty of fair representation. To the contrary, petitioners have conceded that the Unions represented them adequately and that the arbitration proceeding was fairly conducted (Petition, p. 6). Accordingly, petitioners' collateral attack upon the arbitration award herein was properly dismissed by the courts below.

Moreover, even if one were to disregard the above-described restrictions upon individual collateral attacks on arbitration awards, and instead apply the law which would be applicable to a collateral attack by the Unions on the arbitration award, the result below would still obtain. As established by this Court in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960), "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." The Court further stated that an arbitration award must be enforced "so long as it draws its essence from the collective bargaining agreement," (363 U.S. at 597), and added the following:

> ". . . It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

The petitioners herein do not claim that the arbitration committee's decision did not rest upon an interpretation of the collective bargaining agreement, nor do they claim that the decision failed to draw its essence from the collective bargaining agreement. Indeed, the decision was consistent with precedent established

in other decisions, including an earlier decision by the same arbitration committee (R. pp. 195-196). *Cf. Albert v. Chemical Leaman Tank Lines, Inc.*, 344 F. Supp. 1141 (S.D. W. Va. 1972).

Rather, petitioners' sole contention is that the arbitration committee's interpretation of the agreement resulted in a decision that the arbitration committee had no jurisdiction over the matter and thus would not determine the merits of the dispute. Petitioners contend that such a "jurisdictional" decision is not only court reviewable but that it is a decision to be made by the courts rather than the arbitrator. This argument fails for at least two reasons. First, it is clear that the arbitration committee did not decline jurisdiction over the dispute. Its decision went directly to the merits. (See the discussion in the following section *infra.*)

Second, any incursion by the courts into the labor arbitration process under the "jurisdictional" rubric is wholly inconsistent with the judicial deference to that process firmly established by this Court in the *Trilogy* (*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).) Indeed, a contention very similar to that of petitioners was made to this Court in *Warrior & Gulf, supra.* In that case, the issue was phrased by the lower courts in terms of the arbitrator's "right to review" certain conduct of the employer rather than in terms of the arbitrator's "jurisdiction" to review. As in the instant case, however, the underlying issue was whether a particular decision and action of the employer was regulated or restricted by the Agreement. The Court held that the issue was "a question for the arbitrator, not

for the courts," noting that "the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement . . . ." (363 U.S. at 585).

II.

There Is No Conflict of Decision.

Petitioners assert that the decision below conflicts with the decision of the Court of Appeals for the Third Circuit in *Bieski v. Eastern Automobile Forwarding Company,* 396 F.2d 32 (3rd Cir. 1968). While *Bieski* arose on similar facts, it is clearly distinguishable from the instant case.

First, the arbitration panel in *Bieski* found that it had no jurisdiction to determine the merits of the seniority dispute (396 F.2d at 38, 39). However, in the instant case the arbitration committee had before it for final and binding decision not only the interpretation of the terms "successor" and "absorption," but also Article 30, Section 1 of the Local Supplemental Agreement, which provided for determination of ". . . any controversy over the seniority standing of an employee on the seniority list." And the arbitration committee's decision went directly to the merits of the dispute, holding that the former Convoy employees "have no seniority rights with Hadley" arising from the National Master Agreement or Article 30 of the Local Supplemental Agreement. "Therefore," the Committee ruled, "in event former Convoy Company employees are employed by Hadley Auto Transport, their seniority date shall be their date of hire with Hadley Auto Transport." (R. p. 196).

Second, the court's review of the merits in *Bieski* was undoubtedly prompted by allegations in that case

of irregularities in the grievance procedures occasioned by the Union's failure to take an adversary position against the employer. The court noted as follows:

> "This essential opposition was lacking in this case and calls into doubt the reasonableness of the Joint Committee's decision regardless of which contract provision empowered the determination." (396 F.2d at 40.)

This view of *Bieski* is shared by the Court of Appeals for the Fifth Circuit. *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171-72 n. 14 (5th Cir. 1971).*

Accordingly, there is no conflict between *Bieski* and the decision of the Court of Appeals for the Ninth Circuit in the instant case.

Conclusion.

Based upon the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
Counsel for Respondents.

Of Counsel:
DAVID G. FINKLE,
RICHARD N. FISHER,
O'MELVENY & MYERS.

Dated: September 19, 1973.

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*The same distinction is applicable to this Court's dicta in *Humphrey v. Moore*, 375 U.S. 335, 345-48 (1964), in which the Court undertook a review of an arbitration award in order to aid its evaluation of an individual's claim of unfair representation.